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No. 83-1642

In the Supreme Court of the United States

OCTOBER TERM, 1983

U.S. ELECTRICAL MOTORS, A DIVISION OF EMERSON ELECTRIC CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly declined to review, for lack of a final order, a decision of the National Labor Relations Board setting aside a representation election and directing a new election, where that decision was based on conduct that the Board also found to be unfair labor practices and the Board's unfair labor practice findings and order were before the court for review under Section 10(e) and (f) of the National Labor Relations Act, 29 U.S.C. 160(e) and (f).

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Statute:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 722 F.2d 315. The decision and order of the National Labor Relations Board (Pet. App. 13a-60a) are reported at 261 N.L.R.B. 1343.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1983. On February 17, 1984, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including April 7, 1984, and the petition was filed on April 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 10 of the National Labor Relations Act, 29 U.S.C. 160, provides in pertinent part:

> (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any * * * unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter * * *.
>
> * * * * *
>
> (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. * * *
>
> (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside.

Section 9(d) of the National Labor Relations Act, 29 U.S.C. 159(d), provides in pertinent part:

> Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

STATEMENT

1. The International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) filed a petition to represent employees at petitioner's Mena, Arkansas, plant. On October 6, 1978, the Board conducted an election, and the Union lost by a vote of 213 to 200. The Union filed objections to the election and also filed unfair labor practice charges based on petitioner's conduct during the election campaign. The representation and unfair labor practice cases were thereafter consolidated for hearing. Pet. App. 25a-26a.

The Board, substantially adopting the decision of the Administrative Law Judge, found that petitioner had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), during the course of the organizing campaign by interrogating its employees concerning their union activities; by threatening, directly or indirectly, to close the plant if the Union were selected; by threatening that selection of the Union would result in strikes and

violence; by threatening to refuse to bargain in good faith if the Union were selected; and by threatening to discipline employees for alleged violations of a no-solicitation rule based solely upon complaints from other employees (Pet. App. 17a-18a, 32a-49a).[1] The Board's order required petitioner to cease and desist from the unfair labor practices found and from interfering with, restraining, or coercing employees in any like or related manner in the exercise of their rights under the Act (*id.* at 18a-19a).

In the representation portion of the consolidated proceeding, the Board sustained the Union's objections to the election based on the conduct that corresponded to the unfair labor practices found to have occurred after the representation petition was filed. The Board set aside the results of the election and directed that a second election be held. Pet. App. 17a, 19a-20a, 27a, 56a.

2. Petitioner sought review in the United States Court of Appeals for the Sixth Circuit of both the Board's unfair labor practice order and its decision directing a second election. The court enforced the Board's unfair labor practice order and held that it lacked jurisdiction to review the Board's decision directing the second election. Relying on this Court's decisions in *American Federation of Labor* v. *NLRB*, 308 U.S. 401 (1940), and *NLRB* v. *International Brotherhood of Electrical Workers*, 308 U.S. 413 (1940), as well as decisions of other courts of appeals, the court held that the direction of a representation election by the Board

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[1]The unfair labor practices found occurred at various times between May and October of 1978 (Pet. App. 32a-49a). The Board, in agreement with the ALJ, dismissed certain other allegations of unfair labor practice conduct and, reversing the ALJ, dismissed two additional allegations that a supervisor had imposed an invalid no-solicitation rule and that the editor of a local newspaper had acted as an agent of the company in making anti-union statements in the press (*id.* at 14a-16a, 49a-56a).

is not a "final order" within the meaning of Section 10 of the Act, 29 U.S.C. 160, and therefore not subject to direct review. The court observed that it is "uniformly held that since an order of the Board directing an election in a representation proceeding is not a 'final order,' it can only be challenged in the context of the Company's later refusal to bargain because of the asserted error in the Board's order" (Pet. App. 9a).

ARGUMENT

Petitioner does not challenge the Board's findings that it committed unfair labor practices during the initial organizing campaign. Its sole contention is that the court of appeals erred by failing to review the Board's decision directing a second election. There is no merit to that contention.

As the court of appeals correctly noted, this Court long ago established that Board decisions directing elections in representation cases do not constitute "final orders" subject to direct judicial review under Section 10(e) and (f) of the Act, 29 U.S.C. 160(e) and (f). *American Federation of Labor* v. *NLRB*, 308 U.S. at 409; *NLRB* v. *International Brotherhood of Electrical Workers*, 308 U.S. at 414-415; *NLRB* v. *Falk Corp.*, 308 U.S. 453, 459 (1940). Representation proceedings under Section 9 of the Act, 29 U.S.C. 159, are reviewable only after the Board certifies a bargaining representative and "the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed as, for example, where an employer refuses to bargain with a certified representative" and the Board orders the employer to bargain. *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 477 (1964).[2] In such cases, Section 9(d), 29 U.S.C. 159(d),

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[2]This Court has recognized only two exceptions to the general rule that representation proceedings are unreviewable. Direct review in the district courts is warranted when the Board's action raises "public questions particularly high in the scale of our national interest because

provides for full judicial review of the underlying representation proceedings by providing that the record of those proceedings and the certification shall be included in the record required to be filed in the unfair labor practice case pursuant to Section 10, 29 U.S.C. 160. But "[u]ntil [the] election is held, there can be no certification of a bargaining representative and no Board order—based on a certification—* * * so as to invoke the court's powers under 9(d)." *NLRB* v. *Falk Corp.*, 308 U.S. at 459.[3]

Petitioner does not dispute the general proposition that courts lack jurisdiction to review Board decisions directing elections (Pet. 4-5). Petitioner contends, however, that jurisdiction that the Act otherwise withholds from a court of appeals arises whenever the Board directs a *second* election based on employer conduct that also forms the basis of

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of their international complexion," *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963), and when the Board has acted "in excess of its delegated powers and contrary to a specific prohibition in the Act." *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958). Petitioner concedes (Pet. 5 n.7) that neither of the exceptions is applicable to this case.

[3]As the Court made clear in *Boire* v. *Greyhound Corp.*, 376 U.S. at 477-478, the statutory policy of nonreview implements Congress's intent that representation issues be expeditiously resolved in order that collective bargaining rights be effectuated free from time-consuming, dissipating delays that would flow from direct judicial intervention. See also *American Federation of Labor* v. *NLRB*, 308 U.S. at 409-410 & n.2. Congress thus intended to postpone judicial review of election determinations until after the election has been held, a bargaining agent has been certified, " 'and the Board has ordered the employer to do something predicated upon the results of [the] election.' " *Id.* at 411 (quoting 79 Cong. Rec. 7658 (1935) (statement of Sen. Walsh)). Although this "indirect method of obtaining judicial review imposes significant delays upon attempts to challenge [representation rulings], * * * it is * * * obvious that Congress explicitly intended to impose precisely such delays" in order to provide speedy resolution of questions of employee choice by preventing the delay that would be caused by pre-election appeals. *Boire* v. *Greyhound Corp.*, 376 U.S. at 477-478.

an unfair labor practice order properly before the court for review. Petitioner's argument was correctly rejected by the court below, as it has been by every other court of appeals that has considered the issue.[4]

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[4]See, *e.g.*, *Raley's, Inc.* v. *NLRB*, 725 F.2d 1204, 1206 (9th Cir. 1984) (en banc); *Graham Architectural Products Corp.* v. *NLRB*, 697 F.2d 534, 542-543 & n.12 (3d Cir. 1983); *TRW* v. *NLRB*, 637 F.2d 410, 415 n.2 (5th Cir. 1981); *NLRB* v. *Intertherm, Inc.*, 596 F.2d 267, 278 (8th Cir. 1979); *NLRB* v. *Monroe Tube Co.*, 545 F.2d 1320, 1329 (2d Cir. 1976); *NLRB* v. *Auto Crane Co.*, 536 F.2d 310, 311 (10th Cir. 1976); *NLRB* v. *Styletek*, 520 F.2d 275, 277 n.2 (1st Cir. 1975); *American Bread Co.* v. *NLRB*, 411 F.2d 147, 156 (6th Cir. 1969); *Holly Hill Lumber Co.* v. *NLRB*, 380 F.2d 838, 840 (4th Cir. 1967); *Firestone Synthetic Fibers Co.* v. *NLRB*, 374 F.2d 211, 213 n.3 (4th Cir. 1967); *Daniel Construction Co.* v. *NLRB*, 341 F.2d 805, 808-810 (4th Cir.), cert. denied, 382 U.S. 831 (1965); *Hendrix Mfg. Co.* v. *NLRB*, 321 F.2d 100, 106 (5th Cir. 1963); *Bonwit Teller, Inc.* v. *NLRB*, 197 F.2d 640, 642 n.1 (2d Cir. 1952), cert. denied, 345 U.S. 905 (1953); *NLRB* v. *LaSalle Steel Co.*, 178 F.2d 829, 832 n.1 (7th Cir. 1949), cert. denied, 339 U.S. 963 (1950).

Petitioner concedes (Pet. 6 & n.8) that there is no conflict among the circuits on the question it asks this Court to review. Instead, petitioner merely cites (*id.* at 8 n.10, 9-10 & n.11) prior cases that either have been expressly or implicitly overruled or in which the representation orders were properly before the court pursuant to an unfair labor practice order entered upon an employer's refusal to bargain with a duly certified bargaining representative. See *Summa Corp.* v. *NLRB*, 625 F.2d 293 (9th Cir. 1980) (representation proceedings properly before the court on review of final order finding unlawful refusal to bargain following certification); *Anja Engineering Corp.* v. *NLRB*, 685 F.2d 292 (9th Cir. 1982) (expressly overruled in *Raley's, Inc.* v. *NLRB*, 725 F.2d at 1206); *Maremont Corp.* v. *NLRB*, 666 F.2d 1037 (6th Cir. 1981) (implicitly overruled by the court below (see Pet. App. 11a & n.7)).

In *NLRB* v. *General Telephone Directory Co.*, 602 F.2d 912, 920 (9th Cir. 1979), also relied on by petitioner (Pet. 8 n.10), the court reviewed a Board election order with no discussion of the jurisdictional issue addressed by the above-cited cases. *General Telephone* retains no force after the Ninth Circuit's decision in *Raley's, Inc.*, and has been generally discredited. See *Graham Architectural Products Corp.* v. *NLRB*, 697 F.2d at 543 n.14; *id.* at 547 n.6 (Garth J., dissenting).

As this Court explained in *NLRB* v. *Falk Corp.*, 308 U.S. at 456, a representation decision under Section 9 of the Act is "itself a distinct proceeding" even when undertaken in conjunction with an unfair labor practice proceeding under Section 10.[5] Accordingly, neither the Board's procedural decision to consolidate two such distinct statutory proceedings, nor the fact that the conduct at issue in both proceedings may be the same,[6] creates appellate jurisdiction over the representation proceeding. *Id.* at 458-459; see also *Raley's, Inc.* v. *NLRB*, 725 F.2d 1204, 1206 (9th Cir. 1984) (en banc); *Custom Recovery* v. *NLRB*, 597 F.2d 1041, 1046 (5th Cir. 1979) (quoting *Hendrix Mfg. Co.* v. *NLRB*, 321 F.2d 100, 106 (5th Cir. 1963)).

Guided by this well-established principle, courts that have considered the question presented by petitioner have held uniformly that the direction of a second election following an election tainted by an employer's unfair labor practice conduct is no more subject to direct review in the court of appeals than was the first election decision.[7] In

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[5]In *Falk Corp.*, the Court held that the court of appeals had no jurisdiction to review or modify a Board direction of election entered in conjunction with an unfair labor practice order finding that the employer had unlawfully interfered with its employees' right to choose by fostering and dominating a company union. The Board's direction of election excluded the company-dominated union from the ballot. *NLRB* v. *Falk Corp.*, 308 U.S. at 455.

[6]The fact that the same conduct is at issue for other purposes does not detract from the force of the congressional policy of avoiding the delay of pre-election review (see page 6 note 3, *supra*).

[7]See cases cited at page 7 note 4, *supra*.

Petitioner's attempt (Pet. 7, 13) to obtain review of the election direction here by characterizing it as a remedial portion of the unfair labor practice order is mere bootstrapping and is contrary to this Court's teaching in *Falk Corp.* As *Falk Corp.* makes clear, the mere fact that the Board chose as a matter of procedure to consolidate the representation and unfair labor practice proceedings or to issue its

neither case has a free election yet been held, a bargaining agent been certified, or an employer ordered to recognize and bargain with a union based on the certification. Absent a certification and a final unfair labor practice order stemming from an employer's refusal to recognize a certified union, there is simply no statutory jurisdiction regardless of the number of interlocutory election decisions that may be required because of the employer's unlawful conduct during the representation proceedings. See *NLRB* v. *Falk Corp., supra; TRW* v. *NLRB, supra; Hendrix Mfg. Co.* v. *NLRB, supra.*

Should the Board's direction of a second election in this case result in a certification and order to bargain, petitioner will be free to seek full judicial review of the representation proceedings in accordance with the scheme that Congress has fashioned.[8]

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rulings in a single decision does not serve to create appellate jurisdiction that was not granted by the Act. *Falk Corp.*, 308 U.S. at 459; see also *Raley's, Inc.* v. *NLRB, supra; Custom Recovery* v. *NLRB, supra.* There is no jurisdiction until the second election has been held and petitioner has been ordered to bargain "predicated upon the result of [that] election." *NLRB* v. *Falk Corp.*, 308 U.S. at 459.

[8]Petitioner's apparent contention (Pet. 13) that the court of appeals' failure to assert jurisdiction over the election decision in this case will create additional delays not contemplated by Congress lacks merit.

Petitioner cites as support for its contention the narrow category of cases in which the Board ordered an election based on unfair labor practice conduct in the first election and the court denied enforcement of the unfair labor practice order. See, *e.g., Graham Architectural Products Corp.* v. *NLRB*, 697 F.2d 534, 543 (3d Cir. 1983); *NLRB* v. *Monroe Tube Co.*, 545 F.2d 1320 (2d Cir. 1976). In such cases, some judges have observed that judicial economy might be better served by a concurrent review of the election order, because, were the Board to conclude that a second election should nonetheless be held and were the union to prevail in that election, the employer, in response to a second refusal to bargain charge, would be likely to assert in the court of appeals the very same arguments that it had asserted against the first

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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charge. See *Graham Architectural Products Corp.* v. *NLRB*, 697 F.2d at 546-549 (Garth, J., dissenting), reh'g denied, 706 F.2d at 442-444 (Adams, J., dissenting from the denial of rehearing). The courts have held correctly, however, that such considerations do not create jurisdiction not granted by the statute and have noted further that the Board is free to reconsider its second election order in such cases. *Graham Architectural Products Corp.* v. *NLRB*, 697 F.2d at 543; see also *Raley's, Inc.* v. *NLRB*, 725 F.2d at 1206; *id.* at 1207 (Pregerson, J., concurring). In any event, the likelihood of delay and duplicative judicial proceedings is minimized where, as here, the court of appeals enforced the Board's unfair labor practice order in full.